Supreme Court, U.S.
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No. 07-915

In The

Supreme Court of the United States

ANDIE ZAPATA,

Petitioner,

v.

CORRECTION OFFICER "JOHN" MORAN, SHIELD NUMBER UNKNOWN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where petitioner's timely filed complaint was served on respondent four-days after the statutory service period set forth in Federal Rule of Civil Procedure Rule 4(m) had expired, and the statute of limitations would bar commencement of a new action, was the District Court's denial of petitioner's motion for a discretionary extension of time in which to effect service such a departure from the accepted and usual course of judicial proceedings that the Circuit Court's affirmation of said decision warrants the exercise of this Court's supervisory power?

2. Does the Second Circuit's requirement that a plaintiff demonstrate an excuse for his neglect in failing to timely serve process before granting a discretionary extension of time under F.R.C.P. 4(m) establish a standard which conflicts with the decisions of the other Circuit Courts that have considered this matter?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeal for the Second Circuit included the City of New York, respondent Correction Officer "John" Moran, and petitioner Andie Zapata.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Andie Zapata, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, filed on September 20, 2007.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 502 F.3d 192 (2nd Cir. 2007), and appears in Appendix A to this petition. The Opinion of the United States District Court for the Southern District of New York is reported at No. 05 Civ. 4799, slip op. (S.D.N.Y. Jan. 31, 2006), and appears in Appendix B to this petition.

BASIS OF JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered on September 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 4(m): Time Limit for Service states:

> If a defendant is not served within 120 days after the complaint is filed, the court — on

motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

STATEMENT OF THE CASE

On May 18, 2005, pursuant to 42 U.S.C. § 1983, petitioner Andie Zapata commenced this lawsuit in United States District Court (Southern District of New York), alleging deprivation of his civil rights. Specifically, petitioner alleged that on June 27, 2002, while an inmate incarcerated on Rikers Island, he was assaulted by respondent Correction Officer "John" Moran (hereinafter "Moran"). Respondent City of New York (hereinafter "City") was served with the Summons and Complaint on June 2, 2005.

When the action was commenced, petitioner's counsel was unaware of Moran's first name or badge number. Because of this, petitioner's counsel was unable to determine a home or work location for service of process on Moran. Based on prior experience and dealings with the City, it was expected that the missing

information would be provided by the City following its Answer, either as part of the City's mandatory initial disclosures or at the court's initial conference.

On June 22, 2005, the City requested, and was granted, a sixty-day extension of time by which to Answer, and a postponement of the initial conference which had been scheduled for July 15, 2005. The City's Answer was received on or about August 21, 2005, and the initial conference in this matter was held on Friday, September 16, 2005. At said conference, petitioner's counsel was provided with the work location for Moran. Immediately following the conference, copies of the Summons and Complaint in this matter were express mailed to a process server who served Moran on Monday, September 19, 2005, four-days after the statutory period for service had expired.

On or about November 2, 2005, the City moved to dismiss petitioner's complaint arguing, *inter alia*, that all claims against Moran should be dismissed because he was not served with process within the time period required by the Federal Rules of Civil Procedure. Petitioner, in addition to opposing the motion, cross-moved for an extension of time, *nunc pro tunc*, to serve Moran. The aforesaid motions resulted in a Memorandum and Order, dated January 31, 2006, by the Honorable Charles L. Brieant. Justice Brieant dismissed the action as to Moran as time-barred and ruled the

cross-motion to be moot. Pursuant to 28 U.S.C. § 1291, Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit Court of Appeals denied Petitioner's appeal and affirmed the District Court decision.

REASONS FOR GRANTING THE WRIT

I. The decision of the Second Circuit Court of Appeals establishes a standard which conflicts with the decisions of other Circuit Courts that have decided this issue.

Prior to the Court's decision in this matter, the question as to whether a District Court could, in the absence of good cause, exercise its discretion in granting an extension of time under Rule 4(m) was an unanswered question in the Second Circuit. It was not, however, an unexplored topic nationally. Several sister circuits have specifically addressed this issue and uniformly held that District Courts do have discretion to grant extensions of the service period even when there is no good cause shown. *See* Horenkamp v. Van Winkle & Company, 402 F.3d 1129 (11th Cir. 2005); Panaras v. Liquid Carbonic Industries, 94 F.3d 338 (7th Cir. 1996); Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995); Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298 (3rd Cir. 1995).

Though the Second Circuit had not

specifically decided the issue, by the Court's own admission, its ruling on the matter expressed "skepticism about granting extension without good cause". Zapata v. The City of New York, et al., 502 F.3d 192 (2nd Cir. 2007). In Bogle-Assegai v. Connecticut, 470 F.3d 498 (2nd Cir. 2006), the Second Circuit rejected as "unsupported by any authority" the contention that a plaintiff is "not required to show good cause in order to be given an extension of time to make proper service." Bogle-Assegai, 470 F.3d at 508. The Court went on to state that "[Appellant] has not called to our attention any case in which this court has ruled that the good-cause requirement specified in Rule 4(m) may be disregarded, and we are aware of no such case." *Id.* Such language clearly put the Second Circuit in conflict with its sister circuits and out of step with the Supreme Court's own commentary on the issue. *See* Henderson v. United States, 517 U.S. 654, 662-663 (1996)("[I]n 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period even if there is no good cause shown.")

The Second Circuit now seeks to heal the divide by claiming to join step with other circuits in this matter, stating that District Courts have the discretion to grant extensions even in the absence of good cause. If that was the totality of the Court's decision, no fracture would remain. However, a reading of the Court's decision shows that, as a practical matter, the Second Circuit has

established a standard for granting a discretionary extension under F.R.C.P. 4(m) that puts it in conflict with its sister circuits on this issue. The Second Circuit specifically declined to vacate for abuse of discretion because petitioner "not only failed to show good cause but advanced no colorable excuse whatsoever for his neglect." Zapata v. City of New York, et al., 502 F.3d 192, 194 (2nd Cir. 2007). This continues the line of reasoning that the Court suggested in Bogle-Assegai v. Connecticut in which it stated "before we will even consider vacating a Rule 4(m) dismissal for abuse of discretion the plaintiff must ordinarily advance some colorable excuse for neglect. Bogle-Asegai, 470 f.3d at 509. By requiring a showing that there be an "excuse for neglect" on the part of the plaintiff the court has substituted in a good cause requirement. It is axiomatic that, if the plaintiff had an excuse for his neglect, than good cause would exist.

II. The Court of Appeals sanctioned a District Court decision which departed from the accepted and usual course of judicial proceedings.

Federal Rule of Civil Procedure 4(m) governs both the dismissal of actions for untimely service of process and extensions of time in which service may be effected. Prior to 1993, noncompliance with Rule 4(m) unambiguously required dismissal of an action where service had not been effected

within 120-days unless the plaintiff showed good cause for failing to serve. This was so, despite the fact that the statute of limitations might subsequently bar plaintiff's claim. *See* Frasca v. United States, 921 F.2d 450, 452 (2nd Cir. 1990). However, when the Federal Rules of Civil Procedure were amended in 1993, Rule 4(m) was amended to afford plaintiff's greater leniency and courts greater flexibility in matters of service. Specifically, courts were directed to allow additional time if there was good cause for the plaintiff s failure to effect service in the prescribed 120-day period. In addition, courts were given the discretion to allow service more than 120 days after filing even if no good cause was shown. Fed.R.Civ.P. 4(m). As amended, Rule 4(m) "reflects a healthy distaste for dismissing an action based on technical defects in service." Tishman v. Associated Press, 2005 WL 3466022 (S.D.N.Y. December 16, 2005). The Advisory Committee Notes offer some guidance as to what factors the Court should consider when deciding to exercise its discretion to extend time for service if there is no finding of good cause. Although the list is not exhaustive, the Committee explained that "relief may be justified, for example, if the applicable statute of limitations would bar the refiled action..." Fed. R. Civ. P. 4(m) Advisory Committee's Notes (1993).

The Court of Appeals' affirmation of the district court's decision ignores the changes to Rule

4(m) and existing precedent. Indeed, as the Advisory Committee's Notes explain, the 1993 amendments were enacted, *inter alia*, to prevent unjust outcomes in situations identical to the one at hand. While relief is not mandated in every case where the statute of limitations is raised, since the 1993 amendments to Rule 4(m) district courts have consistently employed their discretionary authority to excuse a *de minimis* delay in serving a named defendant where dismissal of the complaint would bar plaintiff from refiling under the statute. See Bourdeau v. Housing Works, Inc., 2001 WL 943316 (S.D.N.Y. 2001)(even though good cause had not been shown, where dismissal of the complaint would bar plaintiff from refiling under the statute of limitations, and there was no prejudice to defendants, a five-day delay in service was excusable); Scally v. Daniluk, No. 96 Civ. 7548(KMW), 1997 WL 639036, (S.D.N.Y. October 15, 1997)(even though good cause had not been shown, where dismissal of the complaint would bar plaintiff from refiling under the statute of limitations, and there was no prejudice to defendants, a four-day delay in service was excusable); Mejia v. Castle Hotel, Inc., 164 F.R.D. 343 (S.D.N.Y. 1996)(even though good cause had not been shown, where dismissal of the complaint would bar plaintiff from refiling under the statute of limitations, and there was no prejudice to defendants, a nine-day delay in service was excusable); Board of Trustees of Trucking Employees of N. Jersey Welfare Fund v. Canny, 876 F.Supp. 14 (N.D.N.Y.

1995)(Where service was perfected only two days beyond 120-day period, and applicable statute of limitations would bar plaintiff's refiling of action, district court declined to dismiss plaintiff's action).

Indeed, district courts have exercised their discretionary authority to excuse far greater time periods than the one at hand. In Charles v. New York City Police Dept., 1999 WL 717300 (S.D.N.Y. Sept. 15, 1999) although two years had passed from the statutory time for service, and no good cause was demonstrated, because the applicable statute of limitations would bar refiling and there was no prejudice to defendants the district court granted plaintiff's motion for an extension to time to serve defendant police officers.

In the instant case, Moran was served with process a mere four days after the 120-day period prescribed by Rule 4(m) had elapsed. Moran was minimally prejudiced, if at all, by the delay in service. It would be difficult to imagine a situation where service on Thursday, September 15, 2005 was proper, but service on the following Monday, September 19, 2005 prejudiced the defendant to such an extent that dismissal would be appropriate. In contrast to the lack of serious prejudice to Moran, for petitioner the three-year statute of limitations has now run, and thus the lower court dismissal effectively extinguishes his ability to recover on what may be a meritorious claim. This is an unduly harsh result that is clearly

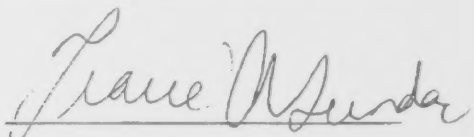
contrary to the Second Circuit's "clearly expressed preference that litigation disputes be resolved on the merits." Cody v. Mello, 59 F.3d 13 (2d Cir. 1995).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: December 17, 2007

Respectfully submitted,



Tracie A. Sundack, Esq.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: August 29, 2007

Decided: September 20, 2007)

Docket No. 06-1059-cv

ANDIE ZAPATA,

Plaintiff-Appellant,

—v.—

THE CITY OF NEW YORK and CORRECTION OFFICER "JOHN" MORAN, Shield Number Unknown,

Defendants-Appellees.

Before:

JACOBS, *Chief Judge*,
KATZMANN, and HALL, *Circuit Judges*.

Appeal from a judgment entered on February 2, 2006 in the United States District Court for the Southern District of New York (Brieant, *J.*), dismissing a § 1983 complaint alleging assault by a corrections officer on a prisoner. The question on appeal concerns the dismissal as to Officer Moran for failure to effect timely service under Rule 4(m):

did the district court abuse its discretion by dismissing without a discretionary extension of the service period where the claim was time-barred absent such an extension?

We affirm.

TRACIE A. SUNDACK, Tracie A. Sundack & Associates, LLC, White Plains, NY, *for Plaintiff-Appellant*.

SUSAN PAULSON, Assistant Corporation Counsel (Francis F. Caputo, *on the brief*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, *for Defendants-Appellees*.

DENNIS JACOBS, *Chief Judge*:

Andie Zapata sues the City of New York and a corrections officer under 42 U.S.C. § 1983, alleging that he was assaulted at the Rikers Island correctional facility by one Officer Moran. He appeals from a judgment of the United States District Court for the Southern District of New York (Brieant, *J.*) insofar as it dismissed Zapata's claim against Officer Moran for failure to effect timely service under Federal Rule of Civil Procedure 4(m) without granting a discretionary extension. Zapata argues that this was an abuse of discretion (notwithstanding his failure to show good cause) because the denial of an extension rendered Zapata's claims time-barred.[1]

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[1] Zapata does not appeal from the dismissal of his claims against the City.

We join several other circuits and hold that district courts may exercise their discretion to grant extensions under Rule 4(m) absent a showing of good cause under certain circumstances; but here, we decline to vacate for abuse of discretion because Zapata not only failed to show good cause but advanced no colorable excuse whatsoever for his neglect.

BACKGROUND

On June 27, 2002 (according to the complaint) Officer Moran assaulted Zapata in the inmate holding pen at the Anna M. Kross Center on Rikers Island, resulting in serious bodily injury. On September 5, 2002, Zapata filed an administrative claim with the City complaining that he had been "assaulted by C.O. Moran #76079" at the "C-95 AMKC clinic waiting area."

More than two years later (on May 18, 2005) Zapata filed a complaint in the district court, naming the City and Officer Moran as defendants in a suit under 42 U.S.C. § 1983 and state common law; the complaint alleged that it was the policy, custom and practice of the City to inadequately supervise, train and discipline their officers.[2] Zapata served the City with a summons and complaint on June 2, 2005. On June 27, 2005 (coincidentally, the day the three-year statute of limitations for Zapata's § 1983 claims

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[2] 42 U.S.C. § 1983 imposes liability on any person who under color of state law "subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Municipalities may only be held liable under § 1983 for the acts of their employees if the deprivation results from a policy or custom of the municipality. *See generally Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

would have run had the complaint not been filed),[3] the City sought a 60-day enlargement of the time in which to file an answer. In its letter to the court, the City noted that Officer Moran had not yet been served. The City filed its answer on August 22, 2005; again, the City stated that, to its knowledge, Officer Moran had not yet been properly served. At an initial conference on September 16, 2005, Zapata's counsel asked the City for Officer Moran's work location. On September 19, 2005, Zapata's counsel forwarded a copy of the summons and complaint by express mail to a process server who served Officer Moran at Riker's Island (the location of the 2002 incident). Federal Rule of Civil Procedure 4(m) provides that actions are subject to dismissal without prejudice unless service is made within 120 days. Zapata's service on Officer Moran was therefore effected four days beyond the service period, and 84 days after the expiration of the original limitations period.[4]

The City moved to dismiss the Complaint on November 2, 2005, on the grounds that all of Zapata's allegations against the City either failed to state a claim or were time-barred, and that Zapata's claims against Officer Moran were subject to dismissal for lack of timely service and should be dismissed with prejudice as time-barred because the statute of limitations had run since the filing of the complaint. On November 23, 2005, Zapata responded to the City's motion to dismiss and cross-moved for an extension,

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[3] "In section 1983 actions [within New York], the applicable limitations period is . . . three years." *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002).

[4] "[T]he statute of limitations for the underlying claim is tolled during [Rule 4's 120-day service] period." *Frasca v. United States*, 921 F.2d 450, 453 (2d Cir. 1990). But if the plaintiff's action is dismissed for a failure to serve within 120 days, "the governing statute of limitations again becomes applicable, and the plaintiff must refile prior to [its] termination . . . ." *Id.*

nunc pro tunc, of the time in which to serve Officer Moran. Zapata claimed that he was unaware of Officer Moran's first name, badge number or work location when he filed the complaint. The City's reply memorandum attached Zapata's September 2002 administrative claim form, which lists Officer Moran's badge number and work location. In a memorandum in further support of the cross-motion, Zapata's counsel explained that she did not know of the existence of the claim form until she received the City's reply, and she argued that the City should have included a copy of the claim form in its initial disclosures.

Zapata's memoranda (in opposition to the motion to dismiss and in further support of the cross-motion) argued that the service period should be extended either for good cause or in light of the harsh application of the statute of limitations. According to Zapata's memoranda, the 1993 Amendments to Rule 4 allowed district courts to grant extensions even in the absence of good cause.

By memorandum opinion on January 31, 2006, the court dismissed Zapata's claims against the City (a decision which Zapata does not challenge on appeal) and dismissed Zapata's claims against Moran as time-barred and declined to grant Zapata an extension of the service period:

> Proof of service . . . confirms this service, four days beyond the 120 day period provided in Rule 4, Fed. R. Civ. P. The Statute of Limitations for the Constitutional tort sued on expired on June 28, 2005. Service of process on Moran made within 120 days would have related back to the filing of the lawsuit on May 18, 2005 and would have been timely. Prejudice is assumed in the case of individuals sued after the Statute of Limitations has run. Such cases differ from those situations cited

> by Plaintiff where the claim itself is not time-barred, but service is late under Rule 4. . . . The case is dismissed as to defendant Moran as time-barred.

Zapata v. City of New York, No. 05 Civ. 4799, slip op. at 2-4 (S.D.N.Y. Jan. 31, 2006). Zapata's cross-motion to extend the service period *nunc pro tunc*, which the district court described as a "[c]ross-Motion . . . for an extension of time to serve papers in opposition to the motion to dismiss," was deemed moot in light of the resolution of the motion to dismiss. *Id.* at 1.

This timely appeal followed.

DISCUSSION

I

Federal Rule of Civil Procedure 4(m) governs both (1) the dismissal of actions for untimely service of process and (2) extensions of the time in which service may be effected. We review for an abuse of discretion a district court's Rule 4(m) dismissal for failure to serve process. *See Thompson v. Maldonado*, 309 F.3d 107, 110 (2d Cir. 2002).

Under Rule 4(m),

> [i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action without prejudice . . . or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Prior to 1993, the substance of this rule appeared in the former Rule 4(j), which provided that if service was not made within 120 days, and the serving party "cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice." The Advisory Committee notes to the 1993 Amendment disclosed the purpose of the amendment:

> The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown . . . . Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service.

Before the 1993 Amendments, we generally did not approve an extension absent a showing of good cause, even when a statute of limitations would bar the re-filed action and effectively convert the dismissal without prejudice under Rule 4(m) into a dismissal with prejudice. *See, e.g.*, *McGregor v. United States*, 933 F.2d 156 (2d Cir. 1991); *Frasca v. United States*, 921 F.2d 450 (2d Cir. 1990). But since 1993, those of our sister circuits that have considered the issue have heeded the Advisory Committee and held that district courts have the discretion to grant extensions of the service period even where there is no good cause shown; and this is consistent with a passing comment from the Supreme Court on the issue. *See, e.g.*, *Henderson v. United States*, 517 U.S. 654, 662-63 (1996) ("[I]n 1993 amendments to the Rules, courts have been accorded

discretion to enlarge the 120-day period 'even if there is no good cause shown.'" (quoting Fed. R. Civ. P. 4(m) Adv. Comm. Notes)); *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132-33 (11th Cir. 2005); *Panaras v. Liquid Carbonic Indus.*, 94 F.3d 338, 340-41 (7th Cir. 1996); *Espinoza v. United States*, 52 F.3d 838, 840-41 (10th Cir. 1995); *Petrucelli v. Bohringer and Ratzinger, Gmbh*, 46 F.3d 1298, 1304-08 (3d Cir. 1995).

While we have not decided the question, our opinion in *Bogle-Assegai v. Connecticut* expressed skepticism about granting extension without good cause: we rejected as "unsupported by any authority of this Court" the contention that plaintiff "was not required to show good cause in order to be given an extension of time to make proper service." 470 F.3d 498, 508 (2d Cir. 2006). This observation was linked to the factual context of that case: "Bogle-Assegai, who was neither a *pro se* litigant nor incarcerated, made no showing whatever as to any effort on her part to effect personal service . . . . And . . . she also made no effort to show good cause for her failure and never requested an extension of time [while] the case was pending after she first learned of the [defendants'] objections to service." *Id.* at 509. Thus *Bogle-Assegai* declined to vacate because the plaintiff failed to advance any cognizable excuse for neglect—even one falling short of good cause. We therefore do not read that decision to hold categorically that good cause is required in every case for an extension of the service period under Rule 4(m). Such a reading of *Bogle-Assegai* would be inconsistent with the wording of the rule and the views of the Supreme Court.

We hold that district courts have discretion to grant extensions even in the absence of good cause. But this holding does not in itself resolve Zapata's appeal.

II

Zapata complains that the district court failed to consider the impact of the 1993 amendments on the former Rule 4(j); this contention necessitates closer attention to the two-clause structure of the post-1993 Rule 4(m), which provides that if service is not effected within 120 days,

> [1] "the court . . . shall dismiss the action without prejudice . . . or direct that service be effected within a specified time"; but that
>
> [2] "if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period."

Some of our sister circuits have characterized the second clause to govern "mandatory" good cause extensions and the first clause to govern "discretionary" extensions in the absence of good cause. *See Coleman v. Milwaukee Bd. of Sch. Dirs.*, 290 F.3d 932, 934 (7th Cir. 2002); *De Tie v. Orange County*, 152 F.3d 1109, 1112 n.5 (9th Cir. 1998); *Boley v. Kaymark*, 123 F.3d 756, 758 (3d Cir. 1997); *Espinoza*, 52 F.3d at 841.

It is clear under the second clause of Rule 4(m) that an extension is always warranted upon a showing of "good cause," because the rule commands that an "appropriate" extension "shall" be granted upon such a showing. But it is perhaps misleading to describe the provision as "mandatory." After all, the district court's determinations on whether good cause is present (and, if so, how long an extension would be appropriate) are exercises of discretion. *See Thompson*, 309 F.3d at 110; *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d 381, 382-83 (7th Cir. 1998).

The first clause of Rule 4(m), which makes no mention of good cause, grants discretion to district courts in a backhanded fashion by dictating that they "shall" take a certain action once 120 days have passed without service: they must decide to dismiss . . . or decide not to dismiss. But no criteria for this decision are supplied in the rule itself; this silence commits extensions in the *absence* of good cause, like determinations on the *presence* of good cause, to the sound discretion of the district court.

Some circuits require district courts to engage in a formal two-step inquiry to first evaluate good cause and then demonstrate their awareness that an extension may be granted even in the absence of good cause. *See, e.g.*, *Panaras*, 94 F.3d at 340-41; *Petrucelli*, 46 F.3d at 1305. In our view, whether such a bifurcated inquiry would be useful is a question best left to the district court: the two steps inevitably involve a weighing of overlapping equitable considerations; and we owe deference to the district court's exercise of discretion whether or not it based its ruling on good cause. So we require no mechanical recitation of the implications of the 1993 Amendment.

Where, as here, good cause is lacking,[5] but the dismissal without prejudice in combination with the statute of limitations would result in a dismissal *with* prejudice, we will not find an abuse of discretion in the procedure used by the district court, so long as there are sufficient indications on the record that the district court weighed the impact that a dismissal or extension would have on the parties.

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[5] Zapata's brief to this Court argues solely that the district court failed to consider a "discretionary" extension under the 1993 Amendments to Rule 4, and Zapata has therefore abandoned any claim to an extension for good cause.

Here, there are abundant indications that the district court was made aware of the scope of its discretion: Zapata argued to the district court both that he had shown good cause and that the time-bar justified an extension even in the absence of good cause; acknowledging Zapata's citation of the latter principle, the district nonetheless denied an extension based on the prejudice that Officer Moran would suffer by being forced to defend a time-barred action.

III

Zapata argues that, aside from the procedure the district court utilized, it was required to grant an extension in light of the absence of prejudice to Officer Moran and the great prejudice to Zapata arising from the operation of the statute of limitations.[6]

As we have held, a district court *may* grant an extension in the absence of good cause, but it is not required to do so. *See Coleman*, 290 F.3d at 934. Moreover, our holding in *Bogle-Assegai* suggests that, before we will even consider vacating a Rule 4(m) dismissal for abuse of discretion, the plaintiff must ordinarily advance some colorable excuse for neglect. 470 F.3d at 509 (declining to consider plaintiff's argument that she was not required to show good cause because "[i]n any event, [the plaintiff] made no showing whatever as to any effort on her part to effect personal service[,] made no effort to show good cause for her failure and never requested an extension of time [while] the case was pending"); *see also Coleman*, 290

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[6] Zapata raises no explicit challenge to the district court's decision to deny an extension of the service period and simultaneously to dismiss his action with prejudice as time barred. We therefore do not address the issue.

F.3d at 934-35 (citing the plaintiff's failure to properly effect timely serve "with no even colorable justification" after holding that "the fact that the balance of hardships favors the plaintiff does not *require* the district judge to excuse the plaintiff's failure to serve the complaint and summons within the 120 days provided by the rule" (emphasis added)).[7]

Zapata takes issue with the district court's statement that prejudice to Officer Moran was "assumed" because the statute of limitations had run. According to Zapata, this reasoning was erroneous and constituted an abuse of discretion, because it is the prejudice to the *plaintiff* that would most naturally be "assumed" where a dismissal without prejudice would time-bar the action. This is a fair point; the Advisory Committee Notes to the 1993 Amendments specifically mention that an extension might be justified where statute of limitations would bar the refiling of an action. And at least one circuit has held that district courts may not deny an extension solely based on the prejudice to the defendant arising from the statute of limitations. *See Boley*, 123 F.3d at 759. But we decline to adopt such a per se rule on the matter. It is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action, especially if the defendant had no actual notice of the existence of the complaint until the service period had

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[7] Because Zapata was denied an extension, we express no opinion on what circumstances will indicate an abuse of discretion where a district court has *granted* an extension without a showing of good cause. *See generally Efaw v. Williams*, 473 F.3d 1038, 1040-41 (9th Cir. 2007). While we read *Bogle-Assegai* to indicate that this Court will not disturb a district court's dismissal absent some colorable excuse raised by the plaintiff, nothing in our opinion should be read as a per se rule that *district courts* must require such an excuse in all cases.

expired; and it is equally obvious that any plaintiff would suffer by having the complaint dismissed with prejudice on technical grounds—this is no less true where the technical default was the result of pure neglect on the plaintiff's part. But in the absence of good cause, no weighing of the prejudices between the two parties can ignore that the situation is the result of the plaintiff's neglect. Thus, while we disagree with the district court's formulation that a dispositive degree of prejudice to the defendant is "assumed" when statute of limitations would bar the re-filed action, we leave to the district courts to decide on the facts of each case how to weigh the prejudice to the defendant that arises from the necessity of defending an action after both the original service period and the statute of limitations have passed before service.

In any event, Zapata's assertion that Officer Moran suffered no prejudice from service only a few days outside the period of service is misleading; while the limitations period was tolled for the service period, prejudice does not toll. Nothing in the record besides the 2002 incident itself suggests Officer Moran had any notice that the action was forthcoming (much less already pending), and service was effected almost three months after the limitations period would have run had the complaint never been filed.

Even assuming the prejudice to Officer Moran was slight, and taking into account the district court's unfortunate choice of language in denying an extension, we find no abuse of discretion. Like the plaintiff in *Bogle-Assegai*, Zapata made no effort to effect service within the service period, neglected to ask for an extension within a reasonable period of time, and has advanced no cognizable excuse for the delay. Zapata's only justification—that he was unaware of Officer Moran's badge number and the location

at which he could be served—is flatly contradicted by the record. Zapata filed an administrative claim in 2002—nearly three years before he filed his complaint—that contained a cursory description of the incident along with Officer Moran's last name, badge number, and work location (the Anna M. Cross Center at Riker's Island). In spite of Zapata's possession of this information, he neither made any attempt to serve Officer Moran at the Rikers Island facility during the 120-day service period nor made any attempt during that period to ask the Court for an extension of time in which to serve Officer Moran. Nothing on the record indicates that Zapata ever requested any information from the City on the issue even though the City pointed out the failure to serve Officer Moran when it made its request for an enlargement of time to answer (nearly three months before the end of the service period) and when it served its answer (more than three weeks before the end of the service period). Zapata finally attempted to serve Officer Moran at Rikers Island *after* the 120-day service period had passed, and even then, rather than immediately asking the district court to bless the untimely service by granting an extension, Zapata waited two months to seek an extension *nunc pro tunc* after receiving the City's motion to dismiss. While Zapata initially responded to the City's motion to dismiss by claiming to have been unaware of Officer Moran's badge number and work location, Zapata's later papers and his brief to this Court state that Zapata's counsel was unaware that Zapata knew Officer Moran's badge number; counsel avers that she assumed that the City would gratuitously supply the information necessary to effect service which she could not (or would not) obtain from her client. In this context, a description of poor communication between client and counsel is a confession of neglect, not an excuse for it. On

these facts, we find no abuse of discretion in the district court's judgment.[8]

CONCLUSION

For foregoing reasons, the judgment of the district court is hereby AFFIRMED.

[8] Zapata also contends that we should vacate the district court's decision because of its alleged failure to correctly describe Zapata's motion to extend the service period *nunc pro tunc*—the district court's decision can be read to erroneously describe the cross-motion as seeking an extension of time in which to oppose the City's motion to dismiss. (In our view, the district court's ambiguous language can also be read to describe the cross-motion for an extension as being a free-standing opposition to the motion to dismiss that is moot in light of the district court's incorporation of the Rule 4 issue into its ruling on the motion to dismiss.) Whether or not the district court correctly described the motion, it confronted the merits of the issue under Rule 4 and made reference to Zapata's citations to authority on the propriety of an extension. So we are confident that the district court would have reached the same conclusion regardless of the manner in which it described Zapata's motion, and there is no need for a remand on this basis.

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APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ANDIE ZAPATA,

Plaintiff,

05 Civ. 4799 (CLB)

-against-

Memorandum And Order

THE CITY OF NEW YORK AND CORRECTION OFFICER "JOHN" MORAN, SHIELD NUMBER UNKNOWN,

Defendants.

----------x

Brieant, J.

By motion heard January 20, 2006 (Doc. 6), defendant City of New York seeks to dismiss this civil rights action brought pursuant to 42 U.S.C. § 1983. Plaintiff Mr. Zapata alleges the use of excessive force against his person by a correction officer, and that the City of New York ("City") failed adequately to train it Department of Correction Officers at Rikers Island. Plaintiff's Cross-Motion, for an extension of time to serve papers in opposition to the motion to dismiss (Doc. 10), filed on November 28, 2005, is now moot. Answering papers were filed by Plaintiff on January 5, 2006. Reply papers were filed by the Defendants on December 8, 2005.

The following facts appear of record viewed

most favorably to Plaintiff. On or about June 27, 2002, at approximately 5:00 p.m., Plaintiff Mr. Andie Zapata alleges that while he was in custody of the City at Riker's Island, defendant Correction Officer Moran, and other employees of the City of New York, not named, assaulted hum unlawfully, and used excessive force against his person without justification. Compl. at ¶¶ 9-10. This incident occurred while Mr. Zapata was in the inmate waiting pen of the Anna M. Kross Center on Rikers Island. *Id.* at ¶¶ 9-10. Mr. Zapata also contends that the Defendants deliberately failed to provide him with the necessary, immediate medical attention. *Id.* at ¶ 14.

Mr. Zapata alleges that the City of New York failed to adequately train, supervise, discipline or in any way control the behavior of Defendant Moran and the other unnamed Correction Officers and that it is the policy, custom, and practice of the City of New York so to do.

Plaintiff filed this lawsuit on May 18, 2005. Defendant The City of New York was served with the Summons and Complaint on June 2, 2005. At the time Plaintiff commenced this action, he was aware only of the individual defendant Correction Officer Moran's last name, and claims his counsel was unable to determine either a home or work location and first name for service of process. The City requested and received a 60-day extension of time to Answer. An initial conference with the Court was held at September 16, 2005 at which time Plaintiff received information regarding the

work location for, and the first name of, Defendant Moran. Plaintiff's Memorandum of Law (Doc. 10) at page 6 advises that copies "were express mailed to our process server who served the defendant on Monday, September 19, 2005, four days after the statutory period had expired." Proof of Service filed November 23, 2005 (Doc. 9) confirms this service, four days beyond the 120 day period provided in Rule 4, Fed.R.Civ.P. The Statute of Limitations for the Constitutional tort sued on expired on June 28, 2005. Service of process on Moran made within the 120 days would have related back to the filing of the lawsuit on May 18, 2005 and would have been timely. Prejudice is assumed in the case of individuals sued after the Statute of Limitations has run. Such cases differ from those situations cited by Plaintiff where the claim is not time-barred, but service is late under Rule 4.

Because the claim is time-barred as against Correction Officer Moran and his unnamed co-workers, and in light of *Monell*, there remains only the boilerplate allegation that the New York City Department of Correction, failed to adequately train, discipline, or in any other way control the correction officers assigned to the Anna M. Kross Center at Rikers Island. In order to establish liability against the City, Mr. Zapata must demonstrate that these alleged violations of his constitutional rights occurred pursuant to a municipal "policy" or "custom." *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *accord. Jeffes v. Barnes*, 208 F.3d 49, 56 (2d Cir. 2000). Mr. Zapata

makes no such showing. He states merely that the City has failed to, and that it is the policy not to, "train, supervise, discipline, or in any other way control..." its Correction Officers, Compl. at ¶¶ 19-21. Clearly Moran is not possessed of policymaking authority. Correction Officers of the City are civil service employees selected from a list of generated by a competitive examination, who do receive approved training when appointed. Whether force used in a given situation is excessive is a matter of degree. No amount of training will obviate fact intensive claims that too much force was used.

A Plaintiff can show that a municipal "policy" exists where: (1) the City has promulgated a formal rule advocating or supporting the contested conduct, or (2) "a single act is taken by a municipal employee who, as a matter of state law, has final policymaking authority in the area in which the action was taken." *Davis v. City of New York*, 228 F. Supp. 2d 327, 336-37 (S.D.N.Y. 2002) (*quoting Monell* at 690 and *Pembaur v. City pf Cincinnati*, 475 U.S. 469, 479-82 (1986).

Monell and its progeny clearly establish that Plaintiff cannot sue the City of New York without proof of city-sanctioned policy or custom of discrimination. This rule would be rendered sterile if, as plaintiff asserts, mere conclusory allegations... were sufficient to hold the municipality liable. *Edwards v. City of New York*, 2005 U.S. Dist. LEXIS 34376 (S.D.N.Y. Dec. 19, 2005).

The motion by the city is granted for failure to show any such policy as claimed. The case is dismissed as to defendant Moran as time-barred.

The Clerk shall file a final judgment.

SO ORDERED

Dated: White Plains, New York

January 31, 2006

/s

Charles L. Brieant, U.S.D.J.